No. 99-697

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In The

Supreme Court of the United States

CLAUDE LAMBERT and MICHELINE LAMBERT,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, a California Municipal Corporation, on Behalf of the SAN FRANCISCO DEPARTMENT OF CITY PLANNING; SAN FRANCISCO CITY ZONING ADMINISTRATOR; and BOARD OF PERMIT APPEALS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a heightened standard of review is applicable to the denial of a use permit application.

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INTRODUCTION

In a well-reasoned decision, the California Court of Appeal held that the San Francisco Planning Commission's denial of Claude and Micheline Lambert's request to convert 24 residential hotel units to tourist use did not effect a taking. Following unanimous authority, the Court of Appeal correctly applied the substantial evidence test to review the Commission's decision.

The Lamberts contend that review of the decision is necessary because the Court of Appeal did not subject the Planning Commission's decision to "heightened scrutiny." The Lamberts urge review based on two contentions: (1) heightened scrutiny is applicable because the Planning Commission demanded that the Lamberts pay a fee of $600,000 as a condition of granting the conversion permit, and the Commission denied the permit only after the Lamberts refused to pay the fee; and (2) the Court of Appeal's opinion conflicts with other decisions as to the applicability of the heightened scrutiny standard. Neither of these claims has merit.

The Lambert's first ground for review relies on a misstatement of the facts. The Planning Commission *did not* demand that the Lamberts pay a mitigation fee in any amount. Nor did the Planning Commission deny the Lamberts' permit because the Lamberts would not pay a fee. The record clearly shows that the Planning Commission denied the conversion to tourist hotel use in order to preserve San Francisco's supply of affordable housing, preserve neighborhood character, and to prevent traffic congestion. Accordingly, the Lamberts' ground for grant

of a writ of certiorari is not factually supported by the record.

The Lambert's second ground for granting a writ must be rejected because there is no conflict between the decision of the California Court of Appeal and this Court as to the conditions under which heightened scrutiny is applied. The decision is consistent with this Court's opinions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those decisions, this Court found that a heightened standard of review is applicable only if the government attempts to leverage its police power by exacting an interest in real property as a condition of approval of a development permit. No such condition was imposed in this case. In fact, the government *denied* the permit. In *City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999), this Court explicitly declined to extend the heightened standard of review from *Nollan* and *Dolan* to the denial of a permit. This Court has also declined to extend the heightened standards of review articulated in *Nollan* and *Dolan* to the imposition of a monetary fee. The California Court of Appeal decision in this case comports with the law of this Court.

The petition for certiorari should be denied.

STATEMENT OF FACTS

As they did in the trial court and the California Court of Appeal, Petitioners Claude and Micheline Lambert ("Petitioners" or "Lamberts") misstate and manipulate the facts to force this case into a heightened scrutiny

analysis. The Lamberts intentionally confuse the City Planning Code with the Residential Hotel Unit Conversion and Demolition Ordinance ("HCO").[1] The Planning Code and the HCO are separate. Two different City agencies, the City Planning Commission and the Department of Building Inspection ("DBI"), respectively, administer these ordinances. Although the two agencies operate independently, the Lamberts falsely attribute the actions of the DBI to the Planning Commission.

The Lamberts challenge only the decision of the Planning Commission to deny a conditional use permit. However, in representing the facts to this Court, the Lamberts alternate between the Planning Commission's administration of the Planning Code and the DBI's administration of the HCO, without acknowledging that the two proceedings were unrelated. This questionable tactic is designed to create the impression that a single City agency, the Planning Commission, "bargained" with the Lamberts over a mitigation fee. To the contrary, the record shows that the Planning Commission's ultimate decision on the Lamberts' application was not in reaction to an unsuccessful attempt to impose a fee.

The Lamberts also misrepresent the Court of Appeal's holding. The Lamberts contend: "[T]he court of appeal held that heightened scrutiny is not applicable when a permit is *denied* for nonpayment of the suspect fee." Petitioners' Petition for Writ of Certiorari ["Pet. for Cert."] at 2, emphasis in original. The Court of Appeal

[1] The full text of the HCO is set forth in Respondent's Appendix at pages 77 through 103.

did not find that the Planning Commission denied the permit "for nonpayment of a fee." Instead, that Court held that heightened scrutiny was not applicable because the Planning Commission denied the permit for legitimate planning reasons. Pet. for Cert. App. A-6 to A-8 ("San Francisco took neither $600,000 nor a permitted use from Lambert . . . [thus] our task is to determine whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision").

In addition, even if the City had unsuccessfully attempted to impose a fee, this Court has not extended the *Nollan/Dolan* heightened standard of review to apply to the denial of any permit or to fees imposed as a condition of development.

I. THE CITY PLANNING CODE AND MASTER PLAN.

San Francisco's Planning Code contains the City's zoning ordinances. In addition to the Planning Code, the City has adopted a general plan, known as the Master Plan, which contains San Francisco's land use policies. The Planning Code prescribes mandatory rules for development; the Master Plan guides the Planning Commission's exercise of discretion in reviewing individual development applications for compliance with the Planning Code.

The Planning Code and Master Plan make the preservation of affordable housing a high priority. S.F. Planning

Code § 101.1(b)(3).[2] Specifically, the Master Plan advises against conversion of rental housing to tourist hotel use. S.F. Master Plan, Residence Element, Objective 3, Policies 5, 7. The Planning Code and Master Plan also mandate preservation of existing housing and neighborhood character. Planning Code § 101.1(b)(2) and (3).

The Planning Code limits the use of residential hotel units for tourist use. Under Planning Code Section 209.2, an owner of a residential building located in a residential zoning district is required to obtain a conditional use permit to convert the building to a commercial use such as a tourist hotel.

The Planning Commission administers the Planning Code and Master Plan. S.F. Charter §§ 3.524, 7.500, 7.501; Planning Code § 101.1. In order to rent residential hotel rooms to tourists on a permanent basis, the owner of a residential hotel located in a residential zoning district must obtain a conditional use permit from the Planning Commission in compliance with Section 209.2(e) and the City's Master Plan. Respondent's Appendix ("RA") 128-30, 155-60.

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[2] The sections of the San Francisco Planning Code, Charter and Master Plan cited in this petition are set forth in the Statutory Appendix to Respondent's Brief on the Merits in the California Supreme Court.

II. THE RESIDENTIAL HOTEL CONVERSION ORDINANCE.

In 1979 the City adopted a moratorium on the conversion of residential hotel rooms to tourist use. HCO § 41.3(d). In 1981, the City adopted the HCO:

> to benefit the general public by minimizing adverse impacts on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.

HCO § 41.2. The City designed the HCO to balance the needs of residential hotel owners to rent rooms to tourists during the summer months when tourist traffic is the heaviest, against the need to preserve San Francisco's existing housing supply. HCO § 41.3, RA 77-78.

The HCO took as its starting point the actual use of residential hotels on September 23, 1979; the HCO regulated changes in use after that date. HCO §§ 41.4(c), 41.6, 41.12, 41.13. Like most zoning controls, the HCO permits owners to continue the residential and tourist use in existence at the time of adoption of the HCO. *Id.*; *see also* HCO § 41.4(s). Thus, the HCO allows owners unlimited tourist use of rooms that were used for tourists in 1979. However, an owner may convert residential units to non-residential use only if the owner obtains a permit to convert by satisfying specified replacement housing conditions. HCO §§ 41.12, 41.13.

The restrictions on conversions of residential to tourist units under the HCO are separate and independent

from the restrictions on conversions of residential to commercial uses in the Planning Code and Master Plan. HCO § 41.4(s). The HCO is not a part of the Planning Code or Master Plan and is not enforced or administered by the Planning Commission. Rather, the HCO is set forth in the City's Administrative Code. RA 77. The DBI, formerly the Bureau of Building Inspection, enforces the HCO. HCO §§ 41.11, 41.14, 41.15.

III. THE CORNELL HOTEL.

The Lamberts are the owners of the Cornell Hotel, a 58-room property in San Francisco. On October 27, 1981, in compliance with the HCO, the Lamberts submitted an Initial Unit Usage Report to the DBI. RA 118-19. In the Report, the Lamberts stated that as of September 23, 1979, there were 31 residential units and 27 tourist units in the Cornell. *Id.* Based on the Report, on March 9, 1982, the DBI issued a Certificate of Use authorizing the operation of 31 residential units and 27 tourist units at the Cornell. RA 121-22. Although the HCO contains a procedure to appeal the DBI's determination (HCO § 41.6(f)), the Lamberts never filed an appeal. Thus, the Certificate of Use became final.

Eight years later, on May 11, 1990, the Lamberts filed an application under the HCO with the DBI to convert the 31 residential rooms in the Cornell to permanent tourist use. RA 157. In order to obtain a permit to convert, the HCO required that the Lamberts first satisfy the requirements of the Planning Code for a conversion to tourist use. RA 128-130; HCO § 41.14(d).

On June 15, 1990, the Lamberts filed an application for a conditional use permit with the Planning Department to convert the 31 residential units to tourist use under the Planning Code. RA 157. The Planning Department serves as the Planning Commission's staff.

On June 25, 1993, the Lamberts requested a formal determination from the Zoning Administrator of the Planning Department as to whether the Lamberts needed a conditional use permit to convert the 31 residential rooms to tourist use. RA 128.[3] The Lamberts contended that the 31 units designated as residential under the HCO were legal nonconforming commercial uses under the Planning Code. RA 157-36. A legal nonconforming use is one that was both legal and actual at the time the zoning law changes to make the use illegal. RA 160. The Lamberts contended that the 31 units were legally and actually tourist units in 1978 when the City amended the Planning Code to add Section 209.2 requiring a conditional use permit for a conversion of residential to tourist uses in the Cornell's zoning district. RA 157-58. By seeking a classification of the 31 units as a legal nonconforming commercial use, the Lamberts hoped to avoid the requirement that they secure a conditional use permit to convert the units. RA 157.

On August 12, 1993, the Zoning Administrator rejected the Lamberts' claim that the 31 units were a legal nonconforming commercial use. RA 128-30. The Zoning

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[3] The Zoning Administrator is responsible for interpretation and enforcement of the Planning Code only. S.F. Charter § 7.502. He or she is not responsible for enforcement of the HCO.

Administrator determined that the 31 units in the Cornell classified as residential under the HCO were also "group housing," a *residential* use for purposes of the Planning Code. *Id.* The Zoning Administrator based his determination, in part, on the Lamberts' own Initial Unit Usage Report filed in October 1981. *Id.* On August 23, 1993, the Lamberts appealed the Zoning Administrator's decision to the Board of Permit Appeals ("BPA"). RA 158.[4]

In January 1994, before the BPA ruled on the Lamberts' appeal of the Zoning Administrator's decision, for the first time the Planning Commission conducted a public hearing on the Lamberts' conditional use application to convert their 31 residential units to tourist's use. Appellants' Appendix ("AA") 97. In the Planning Department Case Report delivered to the Planning Commission before the hearing, the Planning Department staff informed the Planning Commission that the proposed conversion could lead to "the loss of affordable housing, [a] decrease in the City's housing stock, displacement and parking problems in the area." AA 202. The staff also advised that:

> under the policies and objectives of the Master Plan and the provisions of the City Planning

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[4] The BPA is a five-member commission established under the City's Charter to hear appeals from the decisions of the Zoning Administrator, the DBI, and other City officials regarding permits. S.F. Charter § 3.651. However, the BPA is not authorized to hear appeals from the decisions of the Planning Commission on conditional use permit applications. Planning Code § 308.1(a). Appeals from Planning Commission action on conditional use permits are to the City's Board of Supervisors, the legislative body. *Id.*

> Code, authorization of the requested Conditional Use can establish specific conditions (such as payment of a replacement or in-lieu fee) to mitigate any loss of housing which the Planning Commission finds is caused by this conversion.

AA 203.

The staff further advised that *if* the Planning Commission were to approve the application, the Commission had a range of options for requiring mitigation of the loss of housing resulting from the conversion. These options included: (1) no mitigation; (2) a mitigation fee based on formulas previously proposed by the Planning Department; (3) the fee required for a conversion under the HCO, or a variation of that fee; or (4) a requirement that the "loss to the City's housing stock . . . be fully mitigated." AA 203-04. The staff also noted that the Lamberts had proposed a mitigation fee of $100,000. Finally, the staff explained that the Lamberts had instituted a separate proceeding under the HCO in which a mitigation fee had been determined by formula. AA 206.

At all times, the Commission retained the authority to deny the application outright. The Report made "NO RECOMMENDATION" to the Commission as to approval of the application, approval with conditions, or denial. AA 203. The six options listed in the Report were for the Commission's consideration in the event that the Commission decided to approve the application.[5]

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[5] In asking this Court to infer that the Planning Commission denied the conditional use permit because the Lamberts refused to pay a fee greater than $100,000, the Lamberts contend that "denying the application outright was not an option under consideration," citing the Case Report. Pet. for Cert. at 5. The Lamberts mischaracterize the Case Report.

On March 17, 1994, the Commission held a second public hearing on the Lamberts' conditional use application. AA 97-105 (Plan. Comm'n Mot. No. 13659 ("Motion")). The Commission noted that one half of the guest rooms in the Cornell had been in residential use since the Lamberts took over operation of the hotel in 1966. AA 98-99. The Commission found that granting the permit "would result in a loss of the City's housing stock." AA 101.

The Commission discussed the options for mitigating the lost housing if the Commission were to approve the conditional use, including the "offer" by the Lamberts to pay a fee of $100,000. AA 100-02.[6] But the Commission ultimately rejected the mitigation options. Instead, the Commission elected to deny the permit based on three factors. AA 103-05. First, the Commission based its decision on policies in the Master Plan to "retain the existing supply of housing," "prohibit the conversion of rental housing to . . . hotel use," and "preserve the existing stock of residential hotels." AA 104-05.

Second, the Commission agreed with testimony that "the mixed uses found in this area contribute to a lively

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[6] The Commission merely noted that the fee required under the HCO would be $600,000. AA 100. Contrary to the Lamberts' claim (Pet. for Cert. at 17), the Commission did not determine that the Cornell was subject to the HCO or demand the fee due under the HCO. As stated above, the Commission has no authority to apply the HCO. *See supra* at 7.

neighborhood character and support local, neighborhood-serving businesses as well as tourist businesses." AA 102. The Commission found: "Maintenance of the current intensity of use of the property as a mixed residential and commercial building will be compatible with the residential neighborhood." AA 103. Accordingly, the Commission decided that denial of the permit was necessary to "preserve important housing resources near the downtown area," and to "provide for a more stable resident population." AA 103-04.

Finally, the Commission cited the increased traffic congestion that would result from a change in use:

> [C]onversion to an entirely tourist use could result in a substantial increase in the number of tour bus, taxicab and other forms of chartered transportation. The subject property, located on Bush Street, is on a major high volume one-way west to east traffic corridor serving passenger and commercial vehicles to the downtown area. Additional congestion caused by double parking and vehicle movements could impact traffic flow along Bush Street and adversely affect surrounding properties.

AA 104.

Contrary to the Lamberts' factual representations, which both the trial court and the Court of Appeal rejected, the Commission *did not* (1) determine that a mitigation fee of $600,000 would be an "appropriate" exaction; (2) demand that the Lamberts pay a mitigation fee of $600,000, or any other amount; (3) bargain with the Lamberts over the amount of a mitigation fee; or (4) deny

the permit because the Lambert's refused to pay a mitigation fee.

On June 1, 1994, the BPA held a public hearing on the Zoning Administrator's determination that the 31 residential units in the Cornell were classified as residential for purposes of the Planning Code. The BPA upheld the Zoning Administrator in part and overruled him in part. RA 155, 157-60. The BPA found that seven of the 31 units were legal nonconforming tourist uses under the Planning Code. RA 158-60. Accordingly, the Lamberts were not required to secure a conditional use permit to convert those seven units to tourist use under the Planning Code. The BPA also found that 24 of the 31 units were not legal nonconforming tourist uses. Thus, the BPA affirmed the Zoning Administrator's decision that the Lamberts were required to secure a conditional use permit to convert the 24 units. *Id.*[7]

Under the HCO, if the Planning Commission denies a permit to convert to a new use, the DBI must also deny a permit. HCO § 41.14(d), 41.15(c) (denial of conversion permit under HCO mandatory if new use not permitted by the Planning Code). Thus, because the Planning Commission denied the Lamberts' conditional use permit to operate the 24 units as a permanent tourist hotel under

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[7] Despite the BPA's earlier decision that seven of the 31 residential units were exempt from the conditional use requirement under the Planning Code, the DBI required the Lamberts to obtain a conversion permit under the HCO to convert those seven units to tourist use. AA 439. In a later proceeding, however, the BPA allowed the conversion of the seven units without compliance with the HCO. RA 165.

the Planning Code, the DBI also had to deny the Lamberts' application to convert the 24 units under the HCO. *Id.*

REASONS FOR DENYING THE WRIT

The primary dispute in this case is a factual one. The Lamberts' entire case rests on the faulty premise that the San Francisco Planning Commission demanded a cash payment of $600,000 in exchange for a conditional use permit. As the trial court and the California Court of Appeal found, the Planning Commission did not demand such a fee. Instead, the Planning Commission denied the Lamberts' permit based on several legitimate and well-articulated planning concerns. The legal issues presented by Petitioners are not presented by the record of this case. This Court should deny the Lamberts' petition for writ of certiorari.

I. THE PETITION IS PREMISED ON A FAULTY ASSUMPTION; THERE WAS NO UNSUCCESSFUL EXACTION OF A FEE AS A MATTER OF FACT.

The California Court of Appeal correctly held that the Planning Commission did not demand that the Lamberts pay a fee as a condition of approval of the Lamberts' permit. The premise on which the Lamberts base this Petition is wrong. In an attempt to shoe-horn this case into the heightened scrutiny standard established by *Nollan*, 483 U.S. 825 and *Dolan*, 512 U.S. 374, the Lamberts distort and manipulate the facts into a plot by "cash hungry regulatory agencies" to shatter the holding of this

Court in *Nollan*. Pet. for Cert. at 21. Aside from the plain error of such rhetorical accusations, the Lamberts urge this Court to review a legal issue that is not presented by the record. Further, they ask this Court to decide this phantom legal issue based on facts that were *rejected* by the lower courts and that have no support in the record.

The Lamberts allege that the Planning Commission denied a conditional use permit in response to the Lamberts' "refusal to comply with a demand for a cash payment of $600,000 in exchange for the permit." Pet. for Cert. at 2. This statement is simply untrue. The Planning Commission never required the Lamberts to pay $600,000 to convert the 24 units. On the contrary, Planning Commission Motion 13659 states that the Lamberts' application was *disapproved* because the conversion of residential hotel units to permanent tourist use would deplete the City's supply of housing, adversely affect the character of the neighborhood, and increase traffic congestion on a major thoroughfare. AA 103-05. The Court of Appeal recognized that the Lamberts' misrepresent the record. The court stated:

> Although Lambert contended in the trial court, and contends here, that the issuance of the conditional use permit was conditioned on his compliance with the one-for-one provisions of the HCO, *this contention misstates the facts.* The Planning Commission's decision to deny Lambert a conditional use permit was made not under the HCO, but under the authority of the Planning Code. Under that authority, the Planning Commission denied him a conditional use permit altogether. . . . *San Francisco did not demand*

> *anything from Lambert as a condition of a use permit*. It simply denied the permit outright. That the Planning Commission might have granted the permit upon payment of $600,000 does not make its refusal to issue the permit into a taking. . . . In short, as neither a property right nor money was in fact taken from Lambert, there is no reason to determine if a taking would have occurred had Lambert been required to pay $600,000 as a condition of a use permit, and thus there is nothing requiring review under the *Nollan/Dolan/Ehrlich* standard.

Pet. for Cert. App. A-11–A-12, emphasis added.

The Lamberts erroneously assert that the Planning Commission attempted to require the Lamberts to pay the fee due under the HCO. But the Planning Commission has no authority to enforce the HCO. It has independent authority entirely unrelated to the HCO to impose mitigation conditions on permits. *See Guinnane v. San Francisco City Planning Com.*, 209 Cal.App.3d 732, 737-38 (1989) ("The basic standard guiding the planning commission in discharging its function is the promotion of the 'public health, safety, peace, morals, comfort, convenience and general welfare.' ") (citing *Lindell Co. v. Board of Permit Appeals*, 23 Cal.2d 303, 311 (1943).

There is no evidence in the record that the Commission demanded the HCO fee, a higher fee than the fee the Lamberts offered, or any fee at all, or that the Lamberts refused to pay a higher fee. In its Motion, the Planning Commission merely noted that the Lamberts had "offered" to pay $100,000 for a conditional use permit. AA 100. Nor did the Lamberts submit any evidence that

there was any bargaining between the Lamberts and the Planning Commission over a fee.

If the Lamberts had any evidence of such bargaining, they were required to submit it to the trial court in opposition to the City's motion for summary judgment.[8] If such evidence existed, the Lamberts could simply have presented a declaration to the trial court attesting to the particular circumstances of the Planning Commission's "demand" or the Lamberts' "refusal." Alternatively, the Lamberts could have cited to the record of the Planning Commission proceedings. Because the Lamberts failed to present any such evidence, the trial court found that no "unsuccessful exaction" occurred. The Court of Appeal upheld this determination. The City submits that the Supreme Court is limited by the factual determination of the trial court, which was affirmed by the Court of Appeal. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) (deferring to state trial court's findings of fact in connection with federal constitutional claim); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (findings of fact should not be set aside unless clearly erroneous). To find the unsuccessful exaction that Petitioners urge, this Court would not only have to decide that the trial court erred in its fact-finding role, but it would also have to search (in vain) outside of the existing record.

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[8] To oppose the City's motion for summary judgment, the Lamberts had the burden to present sufficient evidence to raise a triable issue. Cal. Code Civ. Proc. § 437c(o)(2).

The Lamberts' claim that the Planning Commission demanded a fee of $600,000 rests on a serious mischaracterization of two distinct legislative processes – the Planning Commission's application of the Planning Code and the DBI's application of the HCO. The Lamberts, blurring the distinction between these two things, refer to "the Planning Commission" where the record shows the Commission acted, but shifts to "the City's staff" and "the City" where the DBI or the BPA was the decisionmaker. By stringing together events taken out of context, the Lamberts create the impression that the Planning Commission bargained with the Lamberts over a fee. In fact, these actions were unrelated.[9]

For example, citing to "AA at 344-45," the Lamberts allege: "The City invited the Lamberts to engage in further monetary negotiations for the permit and subsequently cited the Lamberts' refusal to engage in further haggling as evidence supporting the denial of their application." Pet. for Cert. at 6. But Appellants' Appendix 344-45 refers to a hearing of the BPA on March 22, 1995. That hearing concerned the BPA's application of the HCO to the seven units that the Lamberts ultimately were

[9] In one particularly creative passage of their "Statement of the Case," the Lamberts begin a paragraph referring to the Planning Commission. Pet. for Cert. at 5. In the first sentence of the next paragraph, they use the term "the City," but are in fact referring to the DBI's establishing the replacement housing fee under the formula in the HCO, which occurred two years earlier. Pet. for Cert. at 5-6; AA 179-80. In the next sentence, the Lamberts jump back to the Planning Commission. Pet. for Cert. at 6. But in the next sentence after that, they leap forward to a BPA hearing one year later. *Id.* In the next paragraph, they shift once again to DBI's determination several years earlier. *Id.*

allowed to convert to tourist use. The BPA held the hearing one year after the Planning Commission acted. The issues in that hearing had no connection whatsoever to the Planning Code or to the 24 units in controversy here. By referring to "the City" and failing to note that the Planning Commission had no further involvement with the Cornell, or that a year had passed, the Lamberts' petition makes it appear as if the Planning Commission negotiated with the Lamberts.[10]

II. EVEN IF THE CITY HAD UNSUCCESSFULLY ATTEMPTED TO IMPOSE A FEE, THE COURT OF APPEAL DECISION IS CONSISTENT WITH THIS COURT'S HOLDINGS.

In its most recent case on the application of the "essential nexus" and "rough proportionality" tests established in *Nollan* and *Dolan*, this Court declined to apply the heightened standard of review to a permit denial.[11] *Del Monte Dunes*, 119 S.Ct. at 1635. It should not do so now. Further, even assuming that the City had

[10] The Lamberts further allege: "The City sought to avoid [exposing its exaction to heightened scrutiny] by shrewdly withholding the permit until the $600,000 was in hand. When the Lamberts balked at paying the unconstitutional exaction, the City simply denied their permit outright." Pet. for Cert. at 20, footnote omitted. The Lamberts entangle themselves in their own logic. The Planning Commission could not expect to "increase its revenues to the tune of $600,000" (Pet. for Cert. at 24) by *denying* the permit, in which case the Commission would insure that the City received no revenue.

[11] For consistency, we will refer to the "essential nexus" test of *Nollan* and the "rough proportionality" test of *Dolan* together as the *Nollan/Dolan* heightened standard of review.

demanded that the Lamberts pay a fee as a condition of approval, this Court has not extended the *Nollan/Dolan* heightened standard of review beyond legal challenges to permit conditions that involve physical occupations of private property. It should not do so now. The California Court of Appeal correctly reviewed the case under a rational basis standard of review. *See* Pet. for Cert. App. A-8; *see also Dolan*, 512 U.S. 392 n.8 (in reviewing generally applicable land use regulations, burden is on party challenging regulation to prove arbitrary regulation of property rights) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

A. This Court Has Never Applied A Heightened Standard of Review To The Denial of a Permit.

In this case, the Planning Commission *denied* the Lamberts' permit. Contrary to Petitioners' claim, in *Del Monte Dunes* this Court stated explicitly that the *Nollan/Dolan* heightened standard of review does not apply to denials of permits. 119 S.Ct. at 1635. Further, this Court has affirmed local governments' broad authority to deny land use applications based on the effects of the proposed use, precluding any suggestion that the standard of review for regulatory actions applies in cases not involving any actual exaction. *See Nollan*, 483 U.S. at 835-36.

Petitioners also err when they assert that "there is now a conflict between the state and federal courts in California on this important question of federal constitutional law." Pet. for Cert. at 11. Indeed, this Court *overruled* the Ninth Circuit's decision in *Del Monte Dunes*, in so far as it applied the *Nollan/Dolan* heightened level of

scrutiny to the government's denial of a development permit. 119 S.Ct. at 1635. In deciding this case, the California Courts do not disagree with this result and have also found that *Nollan/Dolan* does not apply to denials of permits.

Del Monte Dunes undermines both Petitioner's argument that there is any conflict between the courts and that the *Nollan/Dolan* heightened standard of review should be applied to permit denials in the regulatory takings context. 119 S.Ct. at 1635. This Court in *Del Monte Dunes* unanimously overruled the Ninth Circuit's decision to apply *Dolan's* rough proportionality test in reviewing a decision by the City of Monterey to deny a development permit. *Id.* Justice Kennedy, writing for the Court, explained that "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use." *Id.* The test, Justice Kennedy wrote, "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development." *Id.* Accordingly Justice Kennedy concluded, "[t]he rough proportionality test of *Dolan* is inapposite to a case such as this one." *Id.*[12]

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[12] Justice Souter, writing for four justices and concurring with Justice Kennedy's position, wrote, "I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally." *Del Monte Dunes*, 119 S.Ct. at 1650 (Souter, J., concurring in part and dissenting in part). Justice Scalia, writing separately, also concurred in the portion of Justice Kennedy's opinion quoted above. *Id.* at 1645. Accordingly, this Court's position on the narrow scope of the *Nollan/Dolan* heightened standard of review is unanimous.

While this Court did not expressly address the scope of the *Nollan* essential nexus test, the Court's analysis in limiting the application of the *Dolan* test would logically apply to *Nollan* as well.[13]

Again, Petitioners err on the facts. As is plain from the Planning Commission's Motion, the Commission did not deny the permit because the Lamberts refused to pay a $600,000 fee. Indeed, there is no mention of a replacement housing fee anywhere in the Commission's statement of its reasons for denying the permit. Rather, the Commission disapproved the Lambert's application because the proposed change in use failed to comply with the City's Master Plan and Planning Code. As the Court of Appeal said:

> Lambert, however, argues there is a triable issue of fact as to whether a taking occurred because the record contains evidence that San Francisco would have granted the conditional use permit had he agreed to pay $600,000. The issue here, however, is not whether a taking occurred, because San Francisco took neither $600,000 nor a permitted use from Lambert. It simply denied him a conditional permit to exploit a property interest. The question is whether San Francisco denied the permit for improper reasons. The Planning Commission found that the proposed

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[13] Petitioners attempt to make an argument that *Nollan* could apply even when the "majority opinion did not endorse the applicability of *Dolan's* rough proportionality test in this context . . . " in *Del Monte Dunes*. Pet. for Cert. at 26. *Dolan*, however, is founded on the *Nollan* opinion. The two opinions, applied together, define the law of regulatory takings in the case of legal challenges to cases requiring dedications of property.

> conversion would not provide a development that is necessary or desirable for, and compatible with, the neighborhood and community.

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The Lamberts have no constitutional right to approval of the *new* use for which they applied. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125-26 (1978), *Agins v. City of Tiburon*, 447 U.S. 255, 261-63 (1980). Thus, the Planning Commission's action was a routine refusal to allow a change in land use, similar to a disapproval of an application to rezone property to a higher use. As such, it is reviewed under the more deferential test applicable to ordinary land use regulation.

B. This Court Has Declined to Extend The Heightened Standard of Review to Fees Imposed in the Permitting Process

The *Nollan/Dolan* heightened standard of review is logically confined to the context of regulatory exactions involving public occupation of private property. Both cases involved regulatory takings challenges to permit conditions that effected a permanent physical occupation of private property. *Dolan*, 512 U.S. at 379-81 (city mandated that owner of hardware store dedicate land for storm drainage system and provide public bike path and greenway); *Nollan*, 483 U.S. at 827-28 (California Coastal Commission demanded public access along ocean beach in front of a homeowners' private property). Petitioners wrongly assume that if the City had indeed demanded $600,000 as a permit condition, "the fee could have been successfully challenged under *Nollan*." Pet. for Cert. at 15-16.

This Court has declined to reach that conclusion. In fact, this Court has strongly indicated in its opinions in *Nollan* and *Dolan* and in its two recent decisions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and *Del Monte Dunes*, 119 S.Ct. 1624, that the heightened level of review in *Nollan* and *Dolan* would not apply beyond cases involving conditions effecting a permanent physical occupation of private property.

The opinions in both *Nollan* and *Dolan* stress the Court's unique concern with government actions that deprive property owners of a portion of their land. This Court has emphasized time and again the special character of permanent physical occupations. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a regulation imposing a physical occupation of property results in categorical taking regardless of how little property is occupied).

The Court explained its reasoning in *Nollan* and *Dolan* in terms of this special character of permanent physical occupations and has accordingly required that these types of exactions will receive particularly stringent review under the Takings Clause. *See Dolan*, 512 U.S. at 385 (conditions at issue differ from ordinary land use regulations, including fact that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."), *Nollan*, 483 U.S. at 841 (court will be "particularly careful" in cases involving a requirement that an owner deed property because of the likelihood that the purpose of the exaction is "avoidance of the compensation requirement, rather than the stated police power objective"). The language in *Nollan/*

Dolan implies that impact fees and non-possessory development conditions are different and not subject to the *Nollan/Dolan* heightened standard of review.[14]

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) further undermines Petitioners' claim that the *Nollan/Dolan* heightened standard of review would apply to a fee as a condition on a development permit. There, this Court implied that the *Nollan/Dolan* heightened standard of review does not extend beyond cases involving a physical occupation of private property to cases involving other conditions such as fees. Five Justices of this Court agreed that the Takings Clause does not apply to government actions that simply impose a financial obligation upon the claimant. *Eastern Enterprises* thus implicitly overruled the California Supreme Court's ruling in *Ehrlich v. City of Culver City*, 12 Cal.4th 854 (1996), that heightened scrutiny may apply where the public agency exacts a fee in an individualized case as a condition of approval of a development project. As described above, in *Del Monte Dunes* this Court also declined to extend the *Nollan/Dolan* standard of review to the general regulatory context. 119 S.Ct. at 1635.

In sum, contrary to Petitioners' unsupported assertions to the contrary, this case does not fit within this

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[14] *See also Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("Given the important distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases, we believe that the "essential nexus" and "rough proportionality" tests are properly limited to the context of development exactions. (citation omitted).")

Court's application of the *Nollan/Dolan* heightened standard of review.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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